

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of May 21, 2014 which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”), section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”), section 2

## PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report along with a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's family physician of 1 year, dated January 16, 2014.
- A letter from the appellant's specialist in physical medicine and rehabilitation, dated June 14, 2006.
- A report on the results of diagnostic imaging of the appellant's lumbosacral spine, dated March 12, 2006.
- Four pages of forms completed by the appellant's former physician for the purpose of applying for the equivalent to disability assistance in another province, dated April 2009.

The panel reviewed the evidence as follows:

### Diagnoses

- In the PR the appellant's physician diagnosed her as having chronic non-specific back pain and chronic depression. In the AR the physician described the appellant's impairments as being "chronic back pain and leg pain." In the AR the physician indicated that the appellant sees a chronic pain specialist and is on a daily antidepressant.
- In the April 2009 application forms for disability benefits in another province, the appellant's former physician reported that the appellant had chronic low back pain with sciatica, osteoarthritis in hands and wrists, carpal tunnel syndrome, osteoarthritis in the knees, and depression.

### Physical Impairment

- In the PR the physician commented that the appellant experiences moderately severe back pain every day. She also commented "Chronic nature. Symptoms are fairly well controlled with medical management and supportive therapy."
- In terms of physical functional skills the physician indicated that the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 stairs unaided, lift 5 to 15 pounds, and remain seated for less than 1 hour.
- In the AR the physician indicated that the appellant independently manages all aspects of mobility and physical ability with respect to walking indoors; walking outdoors (taking significantly longer than typical, and having to stop after 2 city blocks); climbing stairs (but have to hold onto railing); standing (can only stand for 30 minutes); lifting/carrying/holding (limited in weight she can lift. Only able to carry one grocery bag in each hand.)
- The June 14, 2006 letter from the appellant's former specialist in physical medicine and rehabilitation reported that an MRI showed that the appellant has a broad-based disc bulge at the level of L5-S1 consistent with the results of an early CT scan. The specialist noted that the appellant had enjoyed some improvement from medication and physiotherapy.

- The March 12, 2006 imaging report showed advanced disc space narrowing at L5-S1, degenerative vacuum disc phenomena, circumferential disc bulging with mild bilateral foraminal stenosis and slight flattening of the thecal sac. No disc herniation.
- In the April 2009 application forms for disability benefits in another province, the appellant's former physician indicated that the appellant can't sit for more than 30 minutes, can't lift heavy items, can't twist or bend repetitively, and must stop walking after 2-3 blocks due to back and knee pain. The physician noted "Condition is considered chronic/permanent."
- In her self-report the appellant wrote that she can't sit for too long without her leg going numb, and that when sitting in a car she has to get out and walk around for a while. She also said that she cannot stand for too long or her back and hips hurt, and that she has a hard time climbing stairs. She reported that knee, hip and leg pains wake her 2 or 3 times a night.
- In her oral testimony on appeal the appellant said that with her disabilities she can't see herself being able to work. She said that she can only work for a while and then has to rest her back. She stated that the chores she does around the home take much longer than typical to complete.
- In response to a question from the ministry, the appellant responded that she had received the equivalent to disability assistance in another province starting in 2009. She moved to British Columbia in December, 2011.

### Mental Impairment

- In the PR the physician noted that the appellant has a significant deficit in 1 of 12 categories of cognitive and emotional function – emotional disturbance. She commented "Depression – chronic nature. Well controlled (in remission) now."
- In terms of functional skills, the physician indicated in both the PR and the AR that the appellant's ability to communicate is good in all respects.
- In the AR the physician indicated that the appellant's mental impairment has a moderate impact with respect to 1 of 14 categories of cognitive and emotional function: emotion. She indicated a minimal impact with respect to 1 other category: bodily functions (sleep disturbance). Otherwise the physician indicated no impacts in the remaining 12 categories.
- In her self report the appellant wrote that her depression is "pretty well controlled" with her medication, though she wrote that she still has sad times and anxiety.
- In the April 2009 application forms for disability assistance in another province, the appellant's physician at the time indicated that the appellant's depression (described as "recurrent") causes a "sad mood. Difficulties with sleeping, concentration, headaches."

### DLA

- In the PR the physician reported that the appellant has been prescribed no medication or treatments that interfere with her ability to perform DLA.
- In the PR the physician indicated that the appellant's impairments directly restrict her ability to perform 3 of the 10 prescribed DLA: *basic housework*, *daily shopping*, and the outside aspect of the DLA *move about indoors and outdoors*. In describing the degree of restriction, the physician commented "Patient needs longer time than usual to perform ADL's."
- In the AR, which provides more detail by breaking the DLA into various component tasks, the physician indicated that the appellant independently manages all aspects of the 5 DLA of *personal self-care*, *meal preparation*, *manage personal finances*, *manage personal*

*medications, and social functioning.*

- With respect to the DLA of *basic housekeeping*, the physician reported the appellant taking significantly longer than typical.
- With respect to the DLA of *daily shopping*, the physician reported the appellant independently managing all aspects, except that she is unable to carry more than 2 grocery bags.
- Regarding the DLA of *use of transportation*, the physician reported that the appellant can independently use transit schedules and arrange transportation, but there is no access to public transportation in her area, and she takes significantly longer than typical depending on the vehicle – lower vehicles are more difficult.
- With respect to *social functioning*, the physician indicated that the appellant independently manages all aspects, and that she has good functioning with her immediate and extended social networks.
- In the April 2009 application forms for disability benefits in another province, the appellant's former physician indicated that the appellant has pain and difficulty performing "ADL's" such as opening jars and writing.
- In her self-report the appellant wrote that she can't sweep a floor or mop or vacuum without her back causing her pain.
- In response to a question from the ministry as to whether her physician had stated anything in the application forms with which the appellant didn't agree, the appellant said that when she told the physician she could walk 2 blocks, she'd meant 2 blocks in her small community, which are bigger than city blocks. She also stated that the physician had failed to mention that the appellant had been given 3 cortisone shots that failed to provide any relief.
- In response to a question from the panel, the appellant said that when sweeping the floor, or if standing too long to do dishes, she has to sit and stretch because her back gets sore. She said that vacuuming causes tremendous pain. The appellant stated that one thing she can't do is to bend down to clean the tub – a friend does this for her.

#### Help

- The physician reported that the appellant requires no prostheses or aids for her impairment, and that the appellant does not have an assistance animal.
- In response to a question in the AR as to who provides the help that the appellant requires for DLA, the physician indicated "friends", commenting "Patient has no vehicle. Goes to the store with a friend who takes her. No public transit available."
- In response to a question from the ministry as to whether she received any help from anyone to do any DLA other than cleaning the tub, the appellant responded that her friend helps her to carry groceries, he helps with the yard work, and sometimes sweeps her floors.

The panel accepted the appellant's oral testimony as being in support of the information and records that had been before the ministry at reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and provided no new evidence.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA as a result of those restrictions?

The relevant legislation is as follows:

### EAPWDA:

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

**EAPWDR section 2(1):**

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

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**Severe Physical Impairment**

The appellant's position is that her impairments cause severe pain and lack of sleep, constituting a severe physical impairment. She argued that the older medical information from another province should be given significant weight because her physician in the other province knew her longer than her current physician, and the information indicates that her impairment is chronic and permanent.

The appellant also argued that the older medical information had been sufficient to qualify her for the other province's equivalent to disability assistance, and that it should have the same effect in B.C.

The ministry's position – as set out in its reconsideration decision – is that the appellant's level of physical functioning is indicative of a moderate, rather than a severe degree of physical impairment. The ministry argued that the older medical information from another province is not necessarily reflective of the appellant's current medical condition.

### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

With respect to functional skills, the evidence of the physician in the PR and AR indicates that the appellant is in the mid-range of impairment. This is consistent with the physician's statement in the PR that the appellant suffers moderately severe back pain. In the panel's view the older medical information from another province is entitled to less weight than the more current information because of the passage of time. The fact of the appellant's former receipt of disability benefits in another province is not useful, substantially because there is no evidence before the panel as to what statutory criteria are relevant in that province.

There are frequent references in the evidence to the impact the appellant's medical conditions have on her ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

As discussed in more detail in a subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations do not appear to have translated into significant restrictions in the appellant's ability to perform her DLA independently. For the foregoing reasons, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

### Severe Mental Impairment

The appellant advanced no argument with respect to a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is that while the physician diagnosed the appellant with chronic depression, she also noted that the depression is "well controlled" and "in remission". The ministry stated that the physician's evidence in the AR is that the

appellant's depression has at most a moderate impact on her daily functioning.

### Panel Decision

The physician provided a diagnosis of chronic depression, which she described as "well controlled" and "in remission". The physician indicated that the appellant's ability to communicate is good in all respects. She also indicated that the appellant's depression has at most a moderate impact in one category of cognitive and emotional functioning – emotion.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*).

The physician's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages the decision making aspects of *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *manage personal finances* (banking, budgeting, pay rent and bills), *social functioning* (appropriate social decisions) and *meal preparation* (meal planning).

There is no evidence of any restrictions to her *social functioning*, and the physician confirmed in the AR that the appellant has good functioning in respect of her immediate and extended social networks.

Information in the older medical records from the appellant's previous province of residence is not inconsistent with the current information.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

### Significant Restrictions to DLA

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

With respect to the appellant's degree of independence, the panel notes that section 2(3) of the EAPWDA indicates that a person must "require" help as defined. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help she requires, the DLA goes undone either continuously or periodically for extended periods, or the DLA takes an unreasonably long time to complete.



Section 2(1) of the EAPWDA prescribes 10 DLA. Of those 10, the professional evidence in the PR and the AR is consistent that the appellant is unrestricted with respect to at least 6: *personal self care, meal preparation, management of medications, management of finances, social functioning, and decision making.*

Of the remaining 4 DLA – *moving about indoors and outdoors, basic housekeeping, daily shopping, and use of transportation* - the physician has indicated that the appellant manages most aspects of each of them independently, and that she takes longer than typical with other aspects. She's provided no indication of how much longer than typical the appellant may take with these tasks. The appellant's evidence is that she manages her DLA independently, with very little help from a friend in the form of cleaning her bathtub, doing yard work, providing transportation for shopping, and helping to carry groceries in excess of the two bags that the appellant can carry.

Considering the evidence as a whole, while acknowledging a degree of restriction, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that she requires help from a neighbour to perform aspects of DLA such as *basic housekeeping.*

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

### **Panel Decision**

Findings that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

### **Conclusion**

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.